No. 121.

SUPREME COURT

OF THE UNITED STATES.

Filed Oct. 22, 1897.

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NORTHERN PACIFIC RAILROAD COMPANY, et al.,

Appellants.

THE MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY, et al.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLEES.

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The facts are correctly and, except as we shall hereafter point out, fully stated in the opinion of the Court of Appeals and in the brief of counsel for the appellant. But for the convenience of the court we very briefly re-state those on which we think the case turns.

The grant to appellant by the act of July 2nd, 1864, (13 U. S. Statutes 365), is:

> "Every alternate section of public lands * * * to the amount of 20 alternate sections per mile on each side of said railroad line, as said company may adopt, through the territory of the United States, and ten alternate sections per mile on each side of said rail-

road whenever it passes through any state, *and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof.*"

On July 30th, 1870, complainant fixed the *general route* of its road and filed plats thereof with the Secretary of the Interior. *On Aug. 13th, 1870,* the Commissioner of the general land office by direction of the secretary of the interior sent to the local land officers a diagram or map *showing the general route* and requested them "to withdraw from sale or location, pre-emption or homestead entry all the odd numbered sections of public lands falling within the limits of twenty miles, designated on that map." *On September 27th, 1870,* that map was received and the lands withdrawn as requested. *On July 6th, 1882, complainant definitely fixed that portion of its line opposite these lands.* They are within the twenty mile limits of the withdrawl on the general route, and also within the twenty mile (place) limits of complainant's grant as the limits were adjusted and fixed according to the map of definite location. The sole foundation of appellant's claim is this act and the doings aforesaid.

On the other hand, the following facts are to be noted:

By the Act of *June 3rd, 1856,* (11 Statutes, 20) a grant was made to the State of Wisconsin in aid of the line of defendant railway company, of every alternate section of land designated by odd numbers for six sections in width on each side of the line with the right to select indemnity within the fifteen mile limits. That line was *definitely fixed September 20th, 1858.* (Record p. 11.) That grant was enlarged by the Act of *May 5th, 1864,* (13 Statutes, 66). The language of the grant by the latter act is:

"That there be and is hereby granted * * *

every alternate section of public land designated by odd numbers for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the State of Wisconsin for the same purpose by the Act of *June 3rd, 1856*, upon the same terms and conditions as are contained" in said Act of 1856. "But in case it shall appear that the United States have when the line or route of said road is definitely fixed, sold, reserved or otherwise disposed of any sections or parts thereof granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful * * * to select * * * from the public lands of the United States nearest to the tiers of sections above specified, as much land in alternate sections, or parts of sections as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption or homestead right has attached as aforesaid, together with the sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid,) shall be held by the state for the use and purpose aforesaid, provided that the lands to be so selected shall in no case be farther than twenty miles from the line of the said road."

These lands are within the twenty mile (indemnity) limits of that grant and *they were withdrawn* by the secretary of the interior in aid of it in *February or March, 1866*, (Rec. p. 14) *more than four years before even the general route of complainant's line was fixed and more than six years before complainant definitely fixed its line*. That withdrawal remained unrescinded and unmodified until 1889 (Record page 20).

That the defendant railroad company succeeded to all the rights of the state or of any prior donee of the state as to or under that grant is not questioned (Recd. pages 16 and 17).

In 1883 the defendant railway company selected these and other lands in its indemnity limits in lieu of lands lost in

its place limits. Those selections were approved by the local land officers and transmitted to the Commissioner of the General Land Office for his approval. Afterwards, in the same year, the state of Wisconsin caused patents for these lands to be issued to the defendant railway company and it thereafter, and before its selections were disapproved by the Secretary of the Interior, sold and executed deeds therefore to the grantor of this defendant the Musser-Sauntry Company which, the railway company's title having failed, purchased them pursuant to the provisions of Sec. 5 of the Act of March 5th, 1887 (24 U. S. Statutes 557-558). The suit is brought to enjoin the issue of the patents therefor. (Record p. 17-21.)

The question that lies at the foundantion of the appellant's right to maintain this action is: Did the grant to it include these lands? If not, it follows, of course, that it has no standing in court or right to question the title of this defendant, the Musser-Sauntry Company.

ARGUMENT.

It is irrelevant to argue that the grant to the appellant was *in praesenti*. A grant of what? This question is answered by the plain language of the act—i. e. "Lands not *reserved* sold or otherwise appropriated, *and free from pre-emption or other claims or rights at the time the line of road was definitely fixed.*" Though this language is too clear to admit of misconstruction, this Court has been at different times called upon to construe it.

Mr. Justice Field, delivering the opinion of this court in *St. Paul & Pac. Co.*, vs. *N. P. Co.*, 139 U. S. 5, construing this grant said:

> "The route, not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification: but when identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this

sense that the grant is termed one *in praesenti*; that is to say, it is of that character as to all lands within the terms of the grant and not reserved from it at the time of the definite location of the route."

And Mr. Justice Miller, delivering the opinion of this Court in Dunnmeier's case, 113 U. S. 640, construing a similar grant used the following language:

> "These odd numbered sections [in the primary limits] were to be those not sold, reserved or otherwise disposed of by the United States and to which a pre-emption or homestead right had not attached at the time the line of said road is definitely fixed. When the line was fixed, * * * then the criterion was established by which the lands, to which the road had a right, were to be determined. * * * This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States and to which a pre-emption or homestead claim had attached, * * * *In regard to all such sections, they were not granted. The express and unequivocal language of the statute is that the odd sections not in this condition are granted. The grant is limited by its clear meaning to the other odd sections and not to these.*"

See also to the same effect the language of Mr. Justice Harlan, delivering the opinion of this court in *Northern Pacific Ry. Co. vs. Saunders, 166 U. S., 629.* He says:

> "We have seen that the act of July 2nd, 1864, [this act] under which the railroad company claims title, excluded from the grant made by it all lands that were not *at the time the line of the road was definitely fixed* free from pre-emption or other claim or right."

That such a withdrawal, as was made in this case, unless it was illegal, was a "reservation" within the scope and purview of that act, and that the land department may with-

out any express legislative authority legally make such a withdrawal, is not an open question.

Northern Pac. R. Co. v. St. Paul R. Co., 26 Fed., 551, 560-562.

Wis. Cent. R. Co. vs. Forsyth, 159 U. S. 46, 54-55.

Spencer vs. McDougal, 159, U. S. 62 et seq.

St. Paul &c. R. Co. vs. N. P. R. Co., 139 U. S., 1, 17, 18.

Hamblin vs. Western Land Co., 147 U. S., 531.

As said by the court in *St. P. & Pac. R. Co. vs. N. P. R. Co., 139 U. S., 18,* "After such withdrawal no interest in the lands granted can be acquired against the rights of the company except by special legislative declaration."

Nor can the fact be material or affect this question that it was found on the final adjustment of the grant that the withdrawal included more lands than were required to make up for the loss in the place limits. If the defendant railroad company had the right to select lien lands within its indemnity limits the land department had a right to withdraw the lands within these limits until the extent of the losses in the place limits could be ascertained and selections therefor made. The amount of such withdrawals was a matter for the determination of that department that this court will not revise; and the fact that on the final adjustment of the defendant R. Co's. grant it was found that it was not entitled to all of the lands so withdrawn, did not establish complainant's right to those to which its claim failed.

Hamblin vs. Western Land Co., 147 U. S., 531.

Spencer vs. McDougal, 159 U. S. 62, 64.

N. P. R. Co. vs. St. Paul Co., 26 Fed., 551, 560 et seq.

Wolcott vs. Des Moines Co. 5 Wal. 681.

Bullard vs. Des Moines R. Co., 122 U. S. 167.

Kansas Pac. R. Co. vs. Dunmeier, 113 U. S. 629, 633-34, 640 et seq.

Bardon vs. R. Co., 145 U. S. 535.

N. P. R. Co. vs. Saunders, 166 U. S. 620, 630, 633, 635 636 and cases cited there.

Wis. Cent. R. Co. vs. Forsyth, 43 Fed. 867, 881-882 et seq.

This, we think, is not questioned by counsel for complainant. As we understand his contention, it is that *any withdrawal or reservation* of lands for indemnity for the defendant railway company was inoperative, illegal and void, if, on the definite location of the line of appellant, they were found to be within its place limits. At any rate his position if tenable leads to this consequence. We quote from his brief, (pages 9 and 10):

> "The question is whether such withdrawal from public sale constitute a 'reservation' or 'disposition' of such lands within the intent of congress. We submit that the word 'reserved' means reserved for some public purpose, and not merely withheld from sale to fill possible losses in a private grant to another railroad. The intention of Congress was, first, to promote settlement; second, not to embarrass public functions or operations of the United States. This purpose is fully subserved by reading the word reserved as including only reservations for some public or govermental purpose, and as excluding a mere withholding from public sale in order to satisfy possible losses, not yet determined to exist, in another private grant standing on the same footing as to equity and justice." And he explains, on page 8, what he means by "reserved for some public purpose," viz: for "public buildings, forts, arsenals, Indian reservations, and the like."

The position is irreconcilable with *N. P. R. Co. vs. Sanders*, 46 Fed. 239 ib. 7 U. S. App. 47; ib. 166 U. S. 620, and with many other cases decided by this court, some of which we have above cited and is *unsupported either by principal or authority*. The statute, as has been shown, declares that lands "*reserved*, sold, granted or *otherwise appropriated* and not *free* from pre-emption or *other claims or rights*" at the time the line of complainant was definitely fixed were not

granted. Broader or clearer language could hardly have been used, and we respectfully submit that neither reason nor authority can be adduced in support of the proposition that congress did not mean what it said.

The rule in such cases is thus stated by Justice Denman in *Nuth vs. Tamplin*, Law Rep. 8 Q. B. Div., 250:

> "It certainly is a right doctrine to apply to the consideration of all acts of Parliament that unless there are strong reasons for it words should not be imported into an act of Parliament, either by way of extension or limitation."—And by Jessel, Master of the Rolls, in the same case, p. 253: "Now, anyone who contends that a section of an act of Parliament is not to be read literally, must be able to show one of two things, either that there is some other section which cuts down its meaning or else that the section itself is repugnant to the general purview of the act."—

And by Mr. Justice Davis, delivering the opinion of this court in *Newhall vs. Sanger*, 92 U. S., 795.—"There is no authority to import a word into a statute in order to change its meaning."

There is no other section in the act making the grant to the complainant, nor any act in *pari materia*, that cuts down the meaning of that section; nor, is that section repugnant to the general purview of the act.

The authorities cited and relied on by complainant's counsel in support of his contention establish or recognize two well settled legal propositions:

(a) That as to lands in the overlapping place limits of such grants the elder takes the title, irrespective of the dates of the location of their respective lines.

(b) That in the absence of any express provision it will not be presumed that it was intended by a latter grant in aid of a public improvement to interfere with or subtract from an earlier grant for a like improvement.

Beyond these two propositions no case cited by him goes. Both propositions support our contention. The first

is unquestioned. (*See M., K, & T. R. Co. vs. Kan. Pac. R. Co., 7 Otto. 491; St. Paul & Pac. R. Co. vs. N. P. R. Co., 139 U. S. 1, 15.*) The second is directly in point in favor of the principle for which we contend and accords with well settled legal principles and with the decisions of this court. No inference can be drawn from the making of the latter grant that Congress intended to interfere with or lessen the earlier that was presumably equally deserving of aid. No provision is found in the later that can be construed into a repeal or an intention to repeal any clause or portion of the earlier or to take away any right conferred by it; and in the absence of an express repeal, one act is construed to repeal or modify another only when the provisions of the two acts are irreconcilable. Here there is no necessary inconsistancy. This rule is peculiarly applicable in the construction of these land grants.

Mr. Justice Miller, delivering the opinion of this court in *Broder vs. The Water Power Co., 11 Otto. 274*, thus clearly states the rule in such cases:

> "We have had occasion to construe a very common clause of reservation in grants to other railroad companies and in aid of other works of internal improvement, and in all of them we have done so in the light of the general principle that congress in the act of making these donations cannot be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect,,were still meritorious and had just claims to legislative protection."

And Mr. Justice Field, delivering the opinion of this court in Bardon's case, 145 U. S., 535, at page 543, says:

> "Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in the Leavenworth case, [which held that such grants are "confined to lands that congress could rightfully bestow without disturbing existing relations,"] but the decision has been uniformly adhered to since its announcement, and this writer after a much larger experience in the consideration of public land grants since that time, now

readily concedes that the rule of construction adopted, that in the absence of any express provision indicating otherwise a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer both to the government and to private parties than the rule which would pass the property subject to the liens and claims of other." See also *U. S. vs. Oregon R. Co., 57 Fed. 890, 894.*

It is irrelevant to argue that congress *had the power* to grant any and all of the lands in the indmnity limits of the grant to the defendant railroad company until they were selected by it. True. So it is true that congress had the power to grant lands on which a pre-emption claim had been filed and initiated. The question here is not what congress *could do* but what it *did.*

The contention of counsel, carried to its logical consequence, is that until the complainant saw fit to locate its line no lands could be selected or gotten by defendant railway company within its indemnity limits; that its rights to indemnity within any possible limits that complainant might fix were indefinitely suspended. It cannot be presumed that congress intended anything so unreasonable and unjust. Nor is there force in the argument that, because the complainant's right as to lands in its primary limits related back to the date of its grant while the defendant railroad company's rights to lands in its indemnity limits took effect as of the date of selection, therefore the defendant's rights were postponed to those of the complainant. The rights of the defendant railroad company were all bottomed on the grant in aid of its line. *That gave the right to it or to the State for it to select lieu lands within those limits, (U. S. vs. Colton Marble & Lime Co., 146 U. S. 615, 618;)* and authorized the land department to at once withdraw the odd numbered sections within those limits in pursuance of and in aid of that grant. Though inchoate these were very valuable rights and they existed when and before the grant to the complainant was made. The withdrawal made in accordance with the uniform practice in such cases was therefore valid unless that right to select and the right to withdraw were repealed and revoked by the later

grant to the complainant. And we submit that neither reason nor authority justifies the contention that it is to be presumed or inferred from the making of the later grant to the appellant that congress intended to interfere with those pre-existing rights.

We think it unnecessary to comment at length on the cases cited by counsel for appellant or to refer to all of them. None of them declares any principle or doctrine touching any question here involved other than those above stated.

In *Mo., K. & T. R. Co., plaintiff in error, vs. Kan. Pac. R. Co., 97 U. S. 498*, the court after pointing out that the grant to the defendant in error was earlier than the grant to the plaintiff in error, used this language:

> "The grant to this plaintiff in error was in the nature of a float, and the reservations excluded only specific tracts to which certain interests had attached before the grant had become definite, or which had been specifically withheld from sale for public uses, and tracts having a peculiar character, such as swamp lands or mineral lands, the sale of which was then against the general policy of the government. *It was not within its language or purpose to except from its operation any portion of the designated lands for the purpose of aiding in the construction of other roads.*"

The words italicized are relied on by counsel as sustaining his position, but, they admit of no such construction. The question before the court was whether those words should be so construed *in favor of a later grant*, and the court decided that question in the negative. That was the only question in the case, or, as the opinion clearly shows, in the mind of the learned judge who delivered the opinion. He says:

> "The rights of the contesting corporations to the disputed tracts are determined by the dates of their respective grants and not by the dates of the location of the routes of the respective roads, although in this case the location of the route of the plaintiff's road was earlier than that of the defendant's road. This con-

sideration disposes of the case and requires the affirmance of the decree of the Supreme Court of Kansas without reference to the reservations contained in the grant to the defendant."

N. Pac. R. Co. vs. St. P. M. & M. R. Co., 26 Fed. 551, 558, and same case on appeal, 139 U. S. 1-19, cited by counsel, is against him. The contest in that case embraced lands in place, indemnity, lands and lands within withdrawal limits, and the court held according to the long established rule that as between two grants, not priority of construction nor priority of location, but priority of grant, determined the title (26 Fed., 551); and that the grant to the Northern Pacific Company was prior. (Ib., p. 554, 556.) A question then arose which we state in the language of the court (Ib. p. 557): "Assuming the priority of the N. Pac. grant, it is earnestly contended that by its terms all *subsequent grants* made prior to the definite location of its road are excepted. * * * Stress is laid on the use of the word 'granted' in the one act, [that to the N. P. Co.,] and its omission from the other, [to the U. P. Co.] This word, it is claimed, has a well recognized meaning in the land legislation of congress distinct from 'sale,' 'pre-emption,' or 'homestead.' Its use indicates the intention of *future grants* within the territory, and notifies the grantee that *such future grants*, if made before its definite location, will have precedence. In fact, it reserves from this *all such future grants*. (Ib. 557.)"

The court having thus stated the contention of counsel for the St. Paul company, answered it as follows:

"At the hearing the arguments in favor of those views were forcibly presented and seemed to me very persuasive. Subsequent reflection has led me to a different conclusion. I state briefly my reasons. The decision in 97 U. S., *supra*, places all land grant roads on the same plane,—and that, a different one from that occupied by settlers and private purchasers,—and settles all conflicts of title by a rule clear, simple and just, viz: *priority of grant*. Congress may fairly be regarded as standing indifferent between all roads, and

intending to apply this just and simple *rule of priority* as between successive beneficiaries. Before any departure from such intent is adjudged, the fact should be made clear. The burden is on the later beneficiary averring such departure." (Ib. 557, 558.)

The court, after further discussion of the question, added:

"I can but think the rule laid down in 97 U. S., *supra*, applicable to the N. P. land grant, and therefore must hold that the title to the lands in place antedates that of the defendant." (Ib. 559.)

A question remained—whether lands in the indemnity limits of the N. P. Company that were withdrawn in 1870 were excepted from the grant of 1871 to the St. Paul Company and the Court held *that the withdrawal was valid and therefore that the grant to the latter company "never had operative force within its limits,"* (Ib 560, 563.) When the case came before this court it held that the grant to the N P. Co. antedated the grant to the St. Paul Company, adding:

"And the rule has long been settled that when different grants cover the same premises, the earlier takes the title,"(139 U. S. 15.)

The court then proceeded to state the contention of the counsel for the St. Paul Company as fallows:

"It is also argued against the priority of the plaintiff's claim that by the terms of the act making the grant to the N. P. Company *all subsequent grants* prior to the definite location of its road are accepted;" (p. 16) and answered it as follows: "But, independently of this conclusion, we are of opinion that the exception in the act making the grant to the N. P. Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself. *Mo., K. & T. R. Co. vs. Kan. Pac. R. Co., 97 U. S., 491, 498, 499. Besides, the withdrawal made by the Secretary of the Interior of lands within the*

forty mile (indemnity) limits on the 13th of August, 1870, preserved the lands for the benefit of the N. P. Company from the operation of any subsequent grants to other companies not specifically declared to cover the premises." (Ib. p, 17.)

It is thus apparent that these cases are authorities *against* the appellant. And when counsel says:

> "As to lands withdrawn for indemnity for the Northern Pacific Company which fall within the place grant of the St. Paul & Pac. Company, the court was apparently careful *not* to hold that the withdrawal for indemnity would except the lands out of the St. Paul & Pacific grant," (See his brief p. 11,) he undoubtedly overlooked the language of the opinion in this court and the Circuit Court above quoted.

U. S. vs. Oregon &c. R. Co., cited on page 12 of his brief, decides this, and, so far as any question in this case is concerned, nothing more—that "the reservation in the grant to the complainant of granted lands was not made in contemplation of a subsequent bestowal of those lands in aid of another road." 57 Fed. 894.

The only other case cited that we desire to refer to is *U. S. vs. Colton Marble & Lime Co., 146 U. S. 615.*

The facts in that case were, that the United States made a grant of lands to the Atlantic & Pacific R. Co., in 1866, and a grant to the Southern Pacific R. Co., in 1871, to aid in the building of their respective lines of road. The lands involved were in the indemnity limits of the former grant and in the place limits of the latter. In the latter grant it was expressly provided, "That this section—[granting the lands to the Southern Pacific Co.]—shall in no way impair the rights, present or prospective, of the Atlantic & Pacific R. Co., or of any other railway company." The Atlantic & Pacific Company failed to build its line past the lands and its rights under the grant to it were forfeited. The question was, whether the Southern Pacific Company was entitled to the lands. The contention of the United States—the complainants—was,

"That because they were within such indemnity limits [of the Atlantic & Pacific Company,] they were not of the lands granted or intended to be granted to the Southern Pacific Company." This court held that that contention was justified by the proviso above quoted. Mr. Justice Brewer, delivering the opinion of this court, said:

> "The only way in which force can be given to this proviso is to hold that the indemnity lands of the Altantic & Pacific Company were exempted from the grant to the Southern Pacific Company, for, if not exempted, the former company's prospective right of selection would be to that extent impaired. * * * Being within the granted limits of the Southern Pacific, all its rights thereto vested at once at the time of the filing of the map of definite location, and were not and could not be added to after that time; everything it could have in those lands it had then, and at that time there was an existing prospective right on the part of the Atlantic & Pacific Company to make a selection. That prospective right would be impaired by the transfer of the title of a single tract to the Southern Pacific. Hence it follows that the title to none of these indemnity lands passed or could pass to the Southern Pacific Company."

This conclusion was arrived at wholly irrespective of any question of withdrawal. The decision or discussion of any such question would have been wholly irrelevant. Whether they were withdrawn or not they did not fall within the grant to the Southern Pacific Company.

It is unnecessary to add that no inference, therefore, could be drawn from the fact that the court did not discuss the effect of a withdrawal, and it is unnecessary to inquire whether there was any withdrawal in that case.

Apparently forgetting his contention "that the word 'reserved' means reserved for some public purpose or not merely withheld from sale to fill possible losses in a private grant to another railroad," counsel argues:

> "The Omaha grant itself contains an exception of

lands sold, reserved or otherwise disposed of at the time its line is definitely fixed, and as the Northern Pacific grant of place lands became effective as of the 2nd day of July, 1864, upon the definite location of that road such lands were taken out of the Omaha grant under the terms of the exceptions of that grant." See his brief page 9. The force of this argument is not apparent. The exception in the Omaha grant referred to is found in Section 1 of the act of May 5th, 1864 (13 Stat., 66,) and is quoted at length supra p. 4-5.

(a) That exception clearly only refers to lands in the primary limits, not to those in the indemnity limits, as these are.

(b) The line or route of defendant railroad company's road was definitely fixed before the grant to appellant.

(c) Such a reservation is not for the benefit of other *subsequent grants* for a like public improvement.

There is not a shadow of foundation for the contention (complainant's brief, p, 9,) that a withdrawal of lands for indemnity does not prevent the attachment of rights of third parties.

Hamblin vs. Western Land Co., 147 U. S., 531, 536 and cases there cited.

St. Paul & Pac. R. Co. vs. N. P. R. Co. 139 U. S., 1, 17, 18, and other cases above cited.

Secondly.

Even if the complainant was entitled to these lands, it could not maintain this suit.

(a) As the acts alleged do not constitute irreparable injury and complainant's title is denied, the court will not interpose by the extraordinary remedy of injunction.

1st High on Injunctions, 3rd Ed., Secs. 698, 699, 700, 701, 713, 718, 719, 723.

(b) Complainant has an adequate remedy at law if it is entitled to any relief, and for that reason a bill in equity will not lie.

(c) The United States not being parties to this suit an injunction would not prevent *the issuance* of a patent to the defendants; and when executed and recorded a patent will pass the title (if the United States have a title) *without acceptance* by either of these defendants.

U. S. vs. Shurz, 12 Otto, 378, 408.

Bicknell vs. Comstock, 113 U. S., 149.

THOMAS WILSON,
Counsel for Defendants.

NORTHERN PACIFIC RAILROAD COMPANY *v.* MUSSER-SAUNTRY LAND, LOGGING AND MANUFACTURING COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 121. Argued November 30, December 1, 1897. — Decided December 20, 1897.

The withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grants of June 3, 1856, and May 5, 1864, to the State of Wisconsin to aid in the construction of a railroad, exempted such lands from the operation of the grant to the Northern Pacific Railroad Company by the act of July 2, 1864; though it may be

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that a different rule would obtain if the grant to the State had been of a later date than that to the Northern Pacific Company.

As to place lands, it is settled that, in case of conflict, the title depends on the dates of the grants, and not on the times of the filing of the maps of definite location.

It is not intended hereby to question the rule that the title to indemnity lands dates from selection, and not from the grant: but all here decided is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant, and made prior to the filing of the map of definite location by a company having a later grant — the latter having such words of exception and limitation as are found in the grant to the plaintiff — it operates to except the withdrawn lands from the scope of such later grant.

THE facts in this case are as follows: On June 3, 1856, c. 43, 11 Stat. 20, Congress made a grant to the State of Wisconsin to aid in the construction of a railroad of every alternate section of land designated by odd numbers, for six sections in width, on each side of the line, with the right to select indemnity within fifteen-mile limits. The line of this road was definitely fixed September 20, 1858. This grant was enlarged by the act of May 5, 1864, c. 80, 13 Stat. 66, to one of ten alternate sections on each side per mile with indemnity limits extended to twenty miles from the line of the road. The Chicago, St. Paul, Minneapolis and Omaha Railway Company, one of the defendants herein, became the beneficiary of this grant. The road was afterwards constructed, and the lands in controversy are more than fifteen but less than twenty miles from the line of definite location and construction. In March, 1866, the lands within the indemnity limits named in the act of 1864 were by the Secretary of the Interior withdrawn from sale and notice thereof given to the local land officers. This withdrawal remained unrescinded and unaltered until 1889. In 1883 the defendant railway company selected the lands in controversy in lieu of lands lost in its place limits. These selections were approved by the local land officers and transmitted to the commissioner of the general land office for his approval. In the same year the State of Wisconsin issued patents for the lands to that company, which thereafter sold and conveyed them to the grantor of its co-defendant, the land, logging and manufacturing company. On a readjust-

ment of the land grant the railway company's title failed, and thereafter the grantee of the railway company purchased them, pursuant to the act of March 3, 1887, c. 376, 24 Stat. 556.

On the other hand, the Northern Pacific Railroad Company, plaintiff and appellant, on July 2, 1864, c. 217, 13 Stat. 365, 367, received a grant from Congress. The third section of the act making this grant contains this description of the lands granted:

"Every alternate section of public land . . . to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile, on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof."

On July 30, 1870, plaintiff fixed the general route of its road and filed plats thereof with the Secretary of the Interior. On August 13, 1870, a withdrawal of the lands within twenty miles of this route was ordered in aid of the grant. On July 6, 1882, plaintiff definitely fixed that portion of its line opposite these lands. They are within the limits of the above-mentioned withdrawal, and also within the place limits of plaintiff's grant, as those limits were adjusted and fixed according to the map of definite location. Relying upon the title acquired by this grant, and the proceedings had thereunder, as above described, the plaintiff filed its bill on May 3, 1893, in the Circuit Court of the United States for the Western District of Wisconsin, to restrain the issue of patents to the manufacturing company, and to quiet its own title. A demurrer to this bill was, in May, 1894, sustained, and a decree

entered dismissing the bill. On appeal to the Court of Appeals for the Seventh Circuit this decree was affirmed, 34 U. S. App. 66, and thereupon the plaintiff brought the case to this court for review.

Mr. C. W. Bunn for appellants.

Mr. Thomas Wilson for appellees.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

But a single question is presented in this case, and that is whether the withdrawal from sale by the Land Department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864 exempted such lands from the operation of the grant to the plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had "full title, not reserved, sold, granted or otherwise appropriated, and free from preëmption, or other claims or rights, at the time the line of said road is definitely fixed."

The withdrawal by the Secretary in aid of the grant to the State of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the Government under the general land laws. The act of the Secretary was in effect a reservation. *Wolcott* v. *Des Moines Co.*, 5 Wall. 681; *Wolsey* v. *Chapman*, 101 U. S. 755, and cases cited in the opinion; *Hamblin* v. *Western Land Company*, 147 U. S. 531, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent railroad land grants. *St. Paul & Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S. 1, 17, 18; *Wisconsin Central Railroad* v. *Forsythe*, 159 U. S. 46, 54; *Spencer* v. *McDougal*, 159 U. S. 62.

While it is true that the intent of Congress in respect to a land grant is to be determined by a consideration of all the provisions of the statute, and that the word "reserved" may not always be held to include lands withdrawn for the purpose of supplying possible deficiencies in some prior land grant, yet, as that is the ordinary scope of the word, if any narrower or different meaning is to be attributed to it in this grant the reasons therefor must be clear. The use of a word which has generally received a certain construction raises a presumption that Congress used it in this grant with that meaning, and it devolves on the one claiming any other construction to show sufficient reasons for ascribing to Congress an intent to use it in such sense. It is said that the phraseology of the various Congressional grants is different, and therefore each one must be considered by itself. This, in a general way, may be admitted, but at the same time the frequent use of a certain word in a particular sense is, to say the least, very persuasive that it was used in a like sense in this grant.

But beyond the significance of the word "reserved," alone, there are other words in the act which, taken in connection with it, make it clear that these lands do not fall within the grant. "Otherwise appropriated" is one term of description, and evidently when the withdrawal was made in 1866 it was an appropriation of these lands so far as might be necessary for satisfying that particular grant. It is true it was not a final appropriation or an absolute passage of title to the State or the railway company, for that was contingent upon things thereafter to happen; first, the construction of the road, and, second, the necessity of resorting to those lands for supplying deficiencies in the lands in place; still it was an appropriation for the purpose of supplying any such deficiencies. Again, in the description, are the words "free from pre-emption or other claims or rights." Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the

right? But the language is not simply "free from rights," but "free from claims," and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road. *Northern Pacific Railroad* v. *Sanders*, 166 U. S. 620. And such is the general rule in respect to railroad land grants.

Leavenworth, Lawrence &c. Railroad v. *United States*, 92 U. S. 733, furnishes an apt illustration. In that case the granting act contained this provision: "That any and all lands heretofore reserved to the United States, by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act." And it was contended that an Indian reservation was not excepted from the grant because the lands were not reserved to the United States. Upon this the court said (pp. 741, 747): "Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow, without disturbing existing relations and producing vexatious conflicts. . . . Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference, in this respect, whether it be appropriated for Indian or for other purposes." See also *Newhall* v. *Sanger*, 92 U. S. 761, in which it was provided that the grant "shall not defeat or impair any preemption, homestead, swamp land or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any *bona fide* settler;" and it was held that the lands within the boundary of an alleged Mexican or Span-

ish grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands were not within the grant to the company. In *United States* v. *Southern Pacific Railroad*, 146 U. S. 570, 606, it was said: "Indeed, the intent of Congress in all railroad land grants, as has been understood and declared by this court again and again, is that such grant shall operate at a fixed time, and shall take only such lands as at that time are public lands."

There is no force in the contention that this construction might operate to defeat the entire grant to the plaintiff. At the time of the passage of the act of 1864 only in the vicinity of the proposed eastern and western termini were there any settlements. The great bulk of the territory through which the road was to pass was almost entirely unoccupied. Congress, fixing the time for commencing and for finishing the work within two and twelve years, respectively, (Sec. 8,) contemplated promptness in the construction of the road, intending thereby to open this large unoccupied territory to settlement. In view of the road's traversing a comparative wilderness it made a grant of enormous extent. Within the unoccupied territory thus to be traversed there were few settlers and few, if any, land grants. It knew, therefore, that if the company proceeded promptly, as required, it would find within its place limits nearly the full amount of its grant. It must be presumed that Congress acted and would act in good faith, and, of course, there could be no intent to deplete this grant to plaintiff by subsequent legislation in respect to land grants. On the other hand, it must be noticed that the grant to the State of Wisconsin to aid in the construction of the road of the defendant railway company was prior to that to the plaintiff, and also that prior thereto the defendant had filed its map of definite location. In passing the act of July 2, 1864, it is, therefore, reasonable to suppose that Congress had in mind its earlier grant, and did not intend that it should be diminished in any manner thereby, but meant that the defendant railway company should receive either within its place or indemnity limits the full amount of its lands. This, doubtless, was one of the considerations which made the grant to the Northern Pacific of so large an extent.

Syllabus.

It may be well in concluding this opinion to again note the fact, already mentioned, that the withdrawal here considered was one in favor of an earlier grant. It may be that a different rule would obtain in case it was in favor of a later grant. As to place lands, it is settled that, in case of conflict, the title depends on the dates of the grants and not on the times of the filing of the maps of definite location. In other words, the earlier grant has the higher right. No scramble as to the matter of location avails either road, and it may be that the same thought would operate to uphold the title to the place lands of an earlier as against a withdrawal in favor of a later grant. Neither is it intended to question the rule that the title to indemnity lands dates from selection and not from the grant. All that we here hold is, that when a withdrawal of lands within indemnity limits is made in aid of an earlier land grant and made prior to the filing of the map of definite location by a company having a later grant — the latter having such words of exception and limitation as are found in the grant to the plaintiff — it operates to except the withdrawn lands from the scope of such later grant.

We see no error in the record, and the decree of the Court of Appeals is

Affirmed.